

Montana State Library

This cover sheet created by Internet Archive for formatting.

5
S
328.3
13rac
C-2
Dec 84

Administrative Code Committee

Biennial Report to the 49th Legislature

December 1984

PLEASE RETURN

STATE DOCUMENTS COLLECTION

MAY 23 1985

MONTANA STATE LIBRARY
1515 E. 6th AVE.
HELENA, MONTANA 59620



Montana Legislative Council

Published by
MONTANA LEGISLATIVE COUNCIL
Room 138
State Capitol
Helena, Montana 59620
(406) 444-3064

JUN 11 1998

MONTANA STATE LIBRARY



3 0864 0010 1519 0

ADMINISTRATIVE CODE COMMITTEE

A REPORT TO THE 49TH LEGISLATURE

December 1984

Published by

MONTANA LEGISLATIVE COUNCIL

Room 138

State Capitol

Helena, Montana 59620

(406) 444-3064

Dec 11 1984

MEMBERSHIP

ADMINISTRATIVE CODE COMMITTEE

Senator Pete Story,
Chairman

Representative Fritz Daily,
Vice-Chairman

Senator H. W. "Swede" Hammond

Representative Les Kitselman

Senator Lawrence G. Stimatz

Representative James Schultz

Senator Bill Thomas

Representative Gary Spaeth

MONTANA LEGISLATIVE COUNCIL

Representative Rex Manuel, Chairman

Diana S. Dowling, Executive Director

Committee Staff

David S. Niss

Attorney

Gregory J. Petesch

Attorney

Eleanor Eck

Secretary

TABLE OF CONTENTS

	<u>Page</u>
PART I History, Function, and Activities of the Administrative Code Committee . .	1
PART II The Need for the Montana Administrative Procedure Act and Legislative Oversight of Administrative Rulemaking	5
PART III Review of Agency Rules	9
PART IV HB 59 Study	13
PART V Policies Enforced as Law But Not Adopted as Rules	15
PART VI Legislation Recommended by the Committee	17
END NOTES.	19

Appendices:

- A. Survey of Policies, Guidelines, or
Standards Not Adopted as Rules
- B. Proposed Legislation (LC 1)
- C. Proposed Legislation (LC 188)

PART I

HISTORY, FUNCTION, AND ACTIVITIES OF THE ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee is a permanent joint Committee of the Montana Legislature, established in 1975 by Title 5, chapter 14, part 1, MCA. The Committee consists of four members from the House and four members from the Senate, appointed in the same manner as standing committees of the Legislature. The chairman of the Administrative Code Committee is selected by the Committee members. During the biennium covered by this report, the staff of the Committee consisted of one attorney, employed by the Legislative Council, who devoted approximately one-half of his time to Committee business. Six other staff lawyers and a secretary employed by the Council also provided services to the Committee on a part-time basis, reviewing rules of administrative agencies and performing clerical tasks. Meetings of the Administrative Code Committee were held as often as necessary.

The purpose of the Administrative Code Committee, as reflected in the statutes defining its powers and duties, is to review rules proposed and adopted by administrative agencies and filed with the Office of the Secretary of State under the provisions of the Montana Administrative Procedure Act (MAPA), and to generally oversee compliance with the requirements of MAPA. While this authority includes the ability to oversee compliance with those parts of Title 2, chapter 4, MCA, concerning contested case procedure and judicial review of contested cases, by far the largest amount of the Committee's time over the biennium has

been devoted to aspects of the rulemaking process itself. The Committee believes this emphasis is appropriate; not only are the contested case procedures somewhat beyond the authority of the Committee (with the exception of the recommended amendments to statutes), but it has been the intention of the Committee to serve both as a body to provide routine review of executive agency rules and as a forum to which persons with complaints concerning executive rules and executive agency action founded on those rules may turn for less expensive and more timely solutions than legal challenges to agency authority. For this reason, the Committee has sought to publicize its functions in the Montana Administrative Register (MAR), in rulemaking hearings, and has undertaken other efforts to publicize its existence and functions.

Since publication of the Committee's Biennial Report to the Forty-Eighth Legislature in December of 1982, the Committee has held seven meetings to review rules published in the Montana Administrative Register, hear testimony, consider legislation, and conduct studies on specific topics. A schedule of Committee meetings and a summary of the matters discussed follows:

<u>Meeting Date</u>	<u>Meeting Topics</u>
March 16, 1983	Election of Committee Chairman and Vice-Chairman; review of status of SB 451, which centralized the administration of legislative support services; review of 1982 MAR Issues 23 and 24 and 1983 MAR Issues 1 through 4; review of Committee bills.

June 10, 1983	Consideration of SRS rules on reimbursement for skilled nursing and intermediate care services; review of 1983 MAR Issues 5 through 9.
September 23, 1983	Review of agency responses to study of rules mandated by law; approval of memorandum to executive branch agencies concerning new rulemaking legislation; review of 1983 MAR Issues 10 through 15; presentation on <u>Cascade County Convalescent Nursing Home v. Department of SRS.</u>
December 15, 1983	Consideration of Department of Administration disciplinary rules; review of MAR Issues 16 through 20; decision to conduct survey of policies not adopted as rules but enforced as law.
March 2, 1984	Presentation on transactions involving purchase and resale of milk within state; review of district court opinion in <u>Townsend Electric v. Hunter</u> ; review of Committee survey of policies not adopted as rules; review of 1983 MAR Issues 22 through 24 and 1984 MAR Issues 1 and 2.
September 14, 1984	Adoption of bill draft LC 1; review of 1984 MAR Issues 3 through 15; review of policies not adopted as rules.

November 16, 1984 Discussion of Board of Education
rules on programs for gifted and
talented students; approval of LC
188; review of 1984 MAR Issues 16
through 20.

PART II

THE NEED FOR THE MONTANA ADMINISTRATIVE PROCEDURE ACT AND LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING

In Montana, as in most states, the state constitution provides that the lawmaking function is a function of the Legislature and declares that certain procedures must be used in order to enact laws.¹ Historically, it has also been a recognized principle of state law that the Legislature may delegate the power to enact rules to the executive branch, comprised of agencies that are themselves created by the Legislature.² This system of delegation of legislative authority to enact rules binding as law has its support not only in law but also in reason, for the Legislature, being a part-time body and lacking expertise in the many varied purposes of state government, cannot itself have the time, knowledge, and resources to administer the many detailed provisions of the law it enacts. To facilitate the administration of complex legislation, the Legislature authorizes rules, and most rules must be adopted pursuant to the requirements of MAPA.

Because of the definition of "agency" contained in the Montana Administrative Procedure Act, the Act and the rulemaking procedure required by it apply to most state agencies.³ By its application, the Act has standardized many functions of administrative agencies, the most important of which may be the rulemaking function delegated by the Legislature. As a result, persons dealing with state agencies need not obtain information concerning rulemaking and copies of agency rules solely from the agencies themselves, nor must

they distinguish between the many different forms and styles of separate agency regulations. Furthermore, there is no longer a risk that an agency may have adopted rules in a manner unknown and undiscoverable by the general public. Under MAPA, all proposed and adopted rules of every agency covered by the Act must be printed in the Montana Administrative Register, published twice monthly by the Secretary of State; interested persons must be given an opportunity to comment on proposed rules; and the adopted rule must be published in one compilation of state administrative rules. Much good has resulted from these provisions, applying as they do, uniformly to state agencies. The purpose and effect of the Act, however, has sometimes been misconstrued. As the Committee noted in an earlier report to the Legislature,⁴ the Montana Administrative Procedure Act itself has sometimes been blamed for the proliferation of agency rules, and its repeal has sometimes been advocated as the cure to prevent the adoption of those rules. But as the Committee also noted in that previous report,⁵ MAPA does not in itself grant rulemaking authority to state agencies, and a section of the Act now plainly so states.⁶ Rulemaking authority has instead been granted by the Legislature in individual sections of the law scattered throughout the Montana Code Annotated. A typical grant of rulemaking authority, section 37-32-201, MCA, states, with respect to the Board of Cosmetologists:

37-32-201. Rulemaking power. The Board may adopt rules in accordance with the Montana Administrative Procedure Act to implement this chapter and to properly regulate this profession.

The number of grants of rulemaking authority may surprise some. Eight years ago, the Administrative Code Committee Report listed almost 350 statutory sections delegating authority for agencies to adopt administrative rules and also noted that the total number of statutory sections granting rulemaking authority was probably even higher.⁷ As the 1976 Committee report also found, the grants of rulemaking authority that are enacted by the Legislature are often worded in such a manner as to provide little detail and little guidance to executive agencies on the manner in which its rulemaking authority is to be exercised.⁸ While this concern has, as mentioned, previously been the subject of Committee reports to the Legislature, the findings and cautionary remarks and remedial legislation recommended by previous committees is worth noting because rulemaking grants must of necessity continue to be enacted. By way of a solution to the problem of loosely worded and hastily considered delegations of rulemaking authority, the 1976 report of the Administrative Code Committee recommended, and the 45th Legislature enacted, a law requiring each house of the Legislature to provide by joint resolution for a procedure for the adoption of statements of legislative intent whenever rulemaking authority is delegated.⁹

Chapter 11 of the Joint Rules of the Legislature and the resulting statements of legislative intent have been used successfully by the Committee and its staff in guiding the agency rulemaking process.

Over the nearly ten years since the Committee's creation in 1975, the Committee has sponsored other legislation, in addition to that requiring statements

of intent, to help the Legislature exert more influence in the rulemaking process.

However, statements of legislative intent, hearings on agency rules, and similar "mechanical" devices, while certainly helpful, cannot be relied upon in all instances to assure a legal implementation of legislative intention by the agency, much less the "best", most practical, or least expensive implementation of legislative intent. Whether because of oversight, inaccurate use of language, limited time allowed for legislative or committee action, or simple inability to foresee possible legal or economic consequences, it appears almost impossible as a practical matter to frame grants of rulemaking authority and the statutes implemented by them in a manner acceptable to all interests. Hindsight must therefore be used, and legislative oversight becomes a practical necessity. Since the Committee believes that administrators would not intentionally go beyond legal authority granted, the ability of the Committee to go beyond and not be restrained by judicial standards of unreasonableness or arbitrariness in its review process and to recommend alternative solutions within the framework of the legislative grant of authority is a necessary element of legislative oversight.

PART III

REVIEW OF AGENCY RULES

The Committee is required by section 2-4-402, MCA, to review "all proposed rules filed with the secretary of state". The review of rules by the Committee under this section is conducted primarily to determine compliance with statutory requisites for valid rules. Under section 2-4-305, MCA, no rule is effective unless:

- (1) each substantive rule adopted is within the scope of authority conferred by the Legislature and in accordance with other statutory standards;
- (2) the rule is consistent with the statute and reasonably necessary to carry out the purpose of the statute; and
- (3) the rule substantially complies with the requirements of the law relating to the procedure for adoption (e.g., notice, hearing, and submission of comments on the rule).

In order to determine whether a rule complies with these statutory standards, the Committee must review the statute authorizing rulemaking as well as the substantive law implemented by the rule, and must review the procedure used by the agency to propose or adopt the rule. Then, too, the Committee reviews the rule for such additional considerations as length, clarity, and economic impact.

The review procedure used by the Committee begins in every instance with a review by a staff lawyer for both substantive and procedural compliance with the statutes. If an error in any proposed or adopted rule is discovered, the reviewing lawyer notifies the agency concerned and recommends a solution. If the agency agrees with the staff comments and agrees to implement the proposed remedy, the staff objection and agency response are noted in a printed summary of current rules and distributed to the Committee. The staff lawyer then conducts a follow-up as necessary to determine subsequent agency compliance. If the agency disagrees with the staff comment or proposed solution and the staff objection is of a substantive nature, the matter is printed in the Committee summary and is orally brought to the attention of the Committee for action at its next meeting and the agency is given an opportunity to present its views. The Committee then may act by vote or Committee consensus on the staff objection and recommendation. If the agency did not attend the meeting, it is notified of the Committee's recommendation, request, or objection. Follow-up is then conducted as necessary by the Committee staff to determine agency compliance.

Objections generally fall into three major categories:

- (1) "Substantive" objections are that the agency lacks statutory authority for the proposed rule; the rule improperly interprets the language of the statute being implemented; the rule is unnecessary to give effect to the statute implemented; or that the rule has not been adopted in substantial compliance with the procedural requirements of the Administrative Procedure Act. A review of

Committee action during the biennium covered by this report has been included below in part I.

- (2) A second category of objections raised by the staff relate to such matters as any improper citation to the authorizing statute or to the statute being implemented (although both such statutes may in fact exist); improper repetition of statutory language in rules; and ambiguous language and weak rationale for the rule. Objections of this type raised by the staff may be brought to the Committee's attention if the agency disagrees with the objection or recommendation of the staff, depending upon the severity of the violation and the nature of the agency response.
- (3) A third category includes such matters as grammatical errors, spelling and typing errors, etc., and are usually brought to the attention of the agency so that they may be corrected. They are hardly ever brought to the attention of the Committee.

In the great majority of cases in which staff objections were raised to rulemaking errors, the agencies agreed and remedied the staff objection by cancelling the rulemaking proceeding altogether, cancelling the rulemaking proceeding and rule objected to and renoticing the rule in a different form; by amending the proposed rule in the subsequent notice of adoption; or by correcting minor errors in the ARM replacement pages. In most cases of Committee objections, the agencies involved responded positively to the Committee objection. While agencies occasionally disagreed strenuously with staff

objections, in no case did the agency refuse to respond to staff objections.

During the biennium the staff reviewed 435 notices of proposed rulemaking and wrote comments on 154 of the notices. These notices adopted, amended, or repealed approximately 2500 rules.

PART IV

HB 59 STUDY

HB 59 enacted as Chapter 64, Laws of 1983, requires the Administrative Code Committee to review all administrative rules adopted prior to the creation of the Administrative Code Committee for compliance with section 2-4-305, MCA. The Committee identified approximately 2800 rules falling into this category. The staff has begun this project, which is to be completed by January 1, 1987. The review conducted by the staff up to this point indicates that there has been virtually no agency compliance with section 2-4-314, MCA, which requires agencies to review their rules to determine whether they need modification or repeal.

PART V

POLICIES ENFORCED AS LAW BUT NOT ADOPTED AS RULES

As part of its ongoing rule review process, the Committee became aware of areas in which an agency was enforcing an unpromulgated policy as if it were law. At about this time, the case of Townsend Electric, Inc. v. Hunter, Lewis and Clark Co. No. 47160, was decided by District Court Judge Gordon Bennett. Judge Bennett pointed out that policies or rules not adopted pursuant to MAPA lack the force of law and are unenforceable. The Committee decided to conduct a survey of agencies to determine how prevalent this practice was. (Appendix A.) Agency responses to the survey were generally good. The Committee reviewed the responses and decided to direct agencies to adopt policies that they wanted to enforce as formal rules. (Appendix C.) The Committee decided to leave it to each agency to propose exemptions from MAPA in areas in which the agency felt rules should not be adopted.

PART VI

LEGISLATION RECOMMENDED BY THE COMMITTEE

In the course of reviewing agency rules during the period covered by this report, the Committee frequently discussed MAPA, the Committee's statutory authority, and the number and quality of agency rules. The Committee also discussed judicial interpretations of MAPA. In the case of Yanzick v. School District #23 196 M 375, 641 P.2d 431, (1982), the Montana Supreme Court held that the definition of "agency" in section 2-4-102, MCA, included the County Superintendent of Schools and the State Superintendent of Public Instruction. The Committee felt that this holding was contrary to the intent of the Legislature and proposed that its interpretation of the statute be clarified by legislation. The Committee decided to propose LC 1 (Appendix B) to clarify the Legislature's intent in adopting MAPA.

The only other legislation proposed by the Committee is LC 188 (Appendix C), directing agencies to adopt policies having the force and effect of law as administrative rules. (See Part V.)

END NOTES

¹Article V, §1, Montana Constitution; Article V, §11, Montana Constitution.

²See, for example, Chicago, M & St. P. RY Co. v. Board of Railroad Comm'rs., 76 Mont. 305, 247 P. 162 (1926).

³Sections 2-4-102(2) and 2-3-102, MCA; certain exceptions exist, such as the Governor and the Board of Regents.

⁴Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976, p. 5).

⁵The 1976 Report of the Administrative Code Committee to the 45th Legislature reads in part:

...the committee has noted a widespread misunderstanding that the APA is the cause of rules. To clear up any confusion on this issue, the committee has proposed language from the California statutes declaring that the APA can never be used as authority to adopt a substantive rule, and that rule [sic] adopted under authority of another statute must be reasonably necessary to effectuate the purpose of that other statute.

⁶Section 2-4-301, MCA, now provides as follows:

(1) Except as provided in part 2 [which applies only to organizational and procedural rules], nothing in this chapter confers authority upon or augments the authority of any agency to adopt, administer, or enforce any rule.

⁷Report of the Administrative Code Committee to the 45th Montana Legislature (December 1976), pp. 5-7.

⁸Ibid., p. 9.

⁹Ch. 560, L. 1977; Title 5, Ch. 4, MCA.

APPENDIX A

SUMMARY OF POLICIES, GUIDELINES, OR
STANDARDS NOT ADOPTED AS RULES

TO: Elected Constitutional Officers
Agency Directors
Independent Boards and Commissions

FROM: Administrative Code Committee of the Montana
Legislature

RE: Survey of Policies, Guidelines, or Standards Not
Adopted as Rules

DATE: February 8, 1984

At its December, 1983 meeting, the Administrative Code Committee reviewed several examples of agency standards applying law or policy (often referred to as "policies" or "guidelines" themselves) that are apparently intended to be enforced as a "rule", but which have not, perhaps for a variety of reasons, been adopted as a rule under the procedure required by the Montana Administrative Procedure Act (MAPA), contained in Title 2, Ch. 4, MCA. As part of its continuing effort to encourage a high quality of administration of executive programs requiring or supported by rulemaking, the Committee has decided to conduct a survey of executive branch offices, agencies, and boards or commissions, to determine the existence of standards, policies, or guidelines not adopted as rules under MAPA.

The policies or guidelines which are primarily addressed by the Committee's survey of questions, included on the final pages of this letter, are principally those agency actions meeting the following criteria:

1. Satisfying the definition of a "rule" in 2-4-102(10), MCA;
2. Intended by the agency to be enforced as law in some manner; but
3. Which have not been adopted under the rulemaking procedures requiring publication of the rule in the MAR and the ARM.

Each of these survey criteria will be briefly explained.

Principal Survey Criteria

1. The definition of a rule contained in 2-4-102(10) is important to agency actions which are the subject of the study both because of the breadth of that definition, and because of the specific exceptions provided for. The study questionnaire is not concerned, for example, with an officer's or agency's use of the four volumes and index of the Montana Operations Manual, as that manual is exempted under 2-4-102(10) (e).
2. The intended enforcement of a rule is important because if the office or agency does not intend to enforce the rule, it may be considered to be an "adjective or interpretive" rule within the meaning of 2-4-102(11)(b), the adoption of which need not be done in accordance with MAPA requirements. The "enforcement" of a rule, for the purposes of the Committee's study, is simply the treatment of the rule by the office or agency as if the rule were law. Enforcement may therefore include, in addition to traditional civil or criminal enforcement actions, the denial of a benefit such as public assistance or a loan or other grant to, or the requirement of a duty from, a member of the public.
3. Lack of publication in the MAR or ARM is relatively easy to discover. If the agency has adopted a statement falling within the definition of a rule as defined in 2-4-102(10) (criterion #1) which it intends to treat as law (criterion #2), the Committee is interested in the existence of the rule if it has not been published in the Montana Administrative Register and the Administrative Rules of Montana in accordance with sections 2-4-302 or 2-4-303, MCA.

Some agencies, offices, or boards may have no policies which have not been adopted as "rules". Others may have adopted policies satisfying the definition of a "rule" but which the agency does not intend to enforce. Recipients of this letter and Committee survey should note that the Committee is asking all recipients to complete and return the survey to the Committee as there are questions contained in the survey applicable to every recipient that has adopted policies or guidelines meeting the definition of a "rule", even if those policies or guidelines are not enforced or published.

The purpose of the Committee's study is to determine the degree of consistency of administrative interpretations of the rulemaking portions of MAPA, for the purpose of encouraging uniform interpretation, as well as to determine whether legislative action is necessary in any respect. Mrs. Mona Jamison, Counsel to the Governor, has been briefed on the purpose and mechanics of the Committee's survey.

Officers, chairmen, and directors of offices with more than one division, bureau, or other organizational sub-entity should

please take note that the Committee is interested in responses from all sub-entities, and those officers, chairmen, or directors, should therefore complete the Committee's survey on behalf of all divisions, bureaus, etc., within their agency, or provide copies of it to other persons as necessary.

PLEASE RETURN THE COMPLETED
SURVEY FORMS BY MARCH 31, 1984

THANK YOU FOR YOUR COOPERATION. THE SURVEY
BEGINS ON THE NEXT PAGE.

ADMINISTRATIVE CODE COMMITTEE'S SURVEY OF
POLICIES, GUIDELINES, OR STANDARDS
(Please Return by March 31, 1984)

QUESTIONNAIRE

1. Please identify the agency, division, bureau, office, board, or commission for which the survey is completed.
2. Please identify the person completing the survey.
3. Does the entity for which the survey is completed utilize "policies" or "guidelines" meeting all three of the principal survey criteria (fall within the definition of a "rule"; are enforced as law; but not published in MAR/ARM)? (Yes or No) _____
 - a. If the answer to #3 above is "Yes" please go on to questions 4 through 7, below.
 - b. If the answer to #3 is "No" please go on to questions 8 and 9 below.
4. Please describe the subject matter of the "policies" or "guidelines" meeting all of the principal survey criteria or attach copies of them (use additional pages if necessary).
5. Does the public have any opportunity to participate in the formulation of these policies or guidelines? If "Yes" please describe the procedure for public participation.

6. How can these policies or guidelines be located by the persons to whom they apply?
7. What are the reasons for the decision not to adopt these policies or guidelines as rules under MAPA (e.g., cost of the rulemaking process, lack of express rulemaking authority, etc.)?
8. Does the entity completing the survey utilize guidelines which fall within the definition of a "rule" in 2-4-102(10), but which are not enforced (i.e., not treated as law) and are not published in MAR/ARM? ("Yes" or "No") _____
9. If the answer to #8 above is "Yes", please attach a copy of the guidelines which are not enforced or describe the subject matter of those guidelines (use more pages if necessary).

THANK YOU FOR YOUR ASSISTANCE. COPIES OF THE RESULTS OF THE SURVEY WILL BE MADE AVAILABLE UPON REQUEST. PLEASE RETURN THE COMPLETED SURVEY TO THE ADMINISTRATIVE CODE COMMITTEE AT THE FOLLOWING ADDRESS:

Administrative Code Committee
Room 138, State Capitol
Helena MT 59620

APPENDIX B
PROPOSED LEGISLATION (LC 1)

2 INTRODUCED BY _____

4

10

14 WHEREAS, it is clear from the language of section
15 2-4-102(2), MCA, as originally enacted, and from the 1971
16 official comments of the Administrative Procedures
17 Subcommittee recommending the enactment of the Montana
18 Administrative Procedure Act that the Act was never intended
19 to apply to units of local government, school districts, or
20 any other political subdivisions; and

24 WHEREAS, it is the intent of the Legislature that the
25 Act be applied only to those agencies of state government

1 provided for in the Act and the belief of the Legislature
2 that the Act was never intended to apply to units of local
3 government, school districts, or any other political
4 subdivisions of the state.

5 THEREFORE, it is the intent of this bill to clarify
6 that the Montana Administrative Procedure Act does not apply
7 to units of local government, school districts, or any other
8 political subdivisions of this state.

9
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 Section 1. Section 2-4-102, MCA, is amended to read:

12 "2-4-102. Definitions. For purposes of this chapter,
13 the following definitions apply:

14 (1) "Administrative code committee" or "committee"
15 means the committee provided for in Title 5, chapter 14.

16 (2) (a) "Agency" means any agency, as defined in
17 2-3-102, of the state government, except that the provisions
18 of this chapter do not apply to the following:

19 (i) the state board of pardons, except that the
20 board shall be subject to the requirements of 2-4-103,
21 2-4-201, 2-4-202, and 2-4-306 and its rules shall be
22 published in the administrative rules of Montana and Montana
23 administrative register;

24 (ii) the supervision and administration of any penal
25 institution with regard to the institutional supervision,

1 custody, control, care, or treatment of youths or prisoners;

2 ~~(e)(iiii)~~ the board of regents and the Montana
3 university system;

4 ~~(d)(ix)~~ the financing, construction, and maintenance of
5 public works.

6 (2) "Agency" does not include a school district, unit
7 of local government, or any other political subdivision of
8 the state.

9 (3) "ARM" means the administrative rules of Montana.

10 (4) "Contested case" means any proceeding before an
11 agency in which a determination of legal rights, duties, or
12 privileges of a party is required by law to be made after an
13 opportunity for hearing. The term includes but is not
14 restricted to ratemaking, price fixing, and licensing.

15 (5) "License" includes the whole or part of any agency
16 permit, certificate, approval, registration, charter, or
17 other form of permission required by law but does not
18 include a license required solely for revenue purposes.

19 (6) "Licensing" includes any agency process respecting
20 the grant, denial, renewal, revocation, suspension,
21 annulment, withdrawal, limitation, transfer, or amendment of
22 a license.

23 (7) "Party" means any person named or admitted as a
24 party or properly seeking and entitled as of right to be
25 admitted as a party, but nothing herein shall be construed

1 to prevent an agency from admitting any person as a party
2 for limited purposes.

3 (8) "Person" means any individual, partnership,
4 corporation, association, governmental subdivision, agency,
5 or public organization of any character.

6 (9) "Register" means the Montana administrative
7 register.

8 (10) "Rule" means each agency regulation, standard, or
9 statement of general applicability that implements,
10 interprets, or prescribes law or policy or describes the
11 organization, procedures, or practice requirements of an
12 agency. The term includes the amendment or repeal of a prior
13 rule but does not include:

14 (a) statements concerning only the internal management
15 of an agency and not affecting private rights or procedures
16 available to the public;

17 (b) formal opinions of the attorney general and
18 declaratory rulings issued pursuant to 2-4-501;

19 (c) rules relating to the use of public works,
20 facilities, streets, and highways when the substance of such
21 rules is indicated to the public by means of signs or
22 signals;

23 (d) seasonal rules adopted annually relating to
24 hunting, fishing, and trapping when there is a statutory
25 requirement for the publication of such rules and rules

1 adopted annually relating to the seasonal recreational use
2 of lands and waters owned or controlled by the state when
3 the substance of such rules is indicated to the public by
4 means of signs or signals;

5 (e) rules implementing the state personnel
6 classification plan, the state wage and salary plan, or the
7 statewide budgeting and accounting system;

8 (f) uniform rules adopted pursuant to interstate
9 compact, except that such rules shall be filed in accordance
10 with 2-4-306 and shall be published in the administrative
11 rules of Montana.

12 (11) "Substantive rules" are either:

13 (a) legislative rules, which if adopted in accordance
14 with this chapter and under expressly delegated authority to
15 promulgate rules to implement a statute have the force of
16 law and when not so adopted are invalid; or

17 (b) adjective or interpretive rules, which may be
18 adopted in accordance with this chapter and under express or
19 implied authority to codify an interpretation of a statute.
20 Such interpretation lacks the force of law."

21 ~~NEW SECTION.~~ Section 2. Retroactive application.
22 Section 1 shall apply as of December 31, 1972, except that
23 proceedings pending on that date are not affected.

-End-

APPENDIX C

PROPOSED LEGISLATION (LC 188)

1 _____ JOINT RESOLUTION NO. _____

2 INTRODUCED BY _____

3 BY REQUEST OF THE ADMINISTRATIVE CODE COMMITTEE

4

5 A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF
6 REPRESENTATIVES OF THE STATE OF MONTANA DIRECTING AGENCIES
7 TO ADOPT POLICIES HAVING THE FORCE AND EFFECT OF LAW AS
8 ADMINISTRATIVE RULES.

9

10 WHEREAS, Article II, section 9, of the Montana
11 Constitution guarantees to the people the right to know; and

12 WHEREAS, the State of Montana is committed to the
13 concept of open government where every person is allowed to
14 participate; and

15 WHEREAS, the purpose of the Montana Administrative
16 Procedure Act is to give notice of governmental action and
17 the opportunity to express one's opinion regarding that
18 action; and

19 WHEREAS, although government must be concerned about
20 the proliferation of rules regulating the people, this
21 concern is outweighed by considerations of openness and
22 certainty in the public's dealings with government; and

23 WHEREAS, policies enforced as law but not formally
24 adopted as rules have been held invalid by the courts; and

25 WHEREAS, a survey conducted by the Administrative Code

1 Committee has shown that most agencies are utilizing
2 policies not formally adopted as rules.

3

4 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE
5 OF REPRESENTATIVES OF THE STATE OF MONTANA:

6 That policies having the force and effect of law but
7 not formally adopted as rules must be adopted as rules by
8 agencies by October 1, 1987.

-End-



200 copies of this public document were published at an estimated cost of \$1.85 per copy, for a total cost of \$370.00, which includes \$370.00 for printing and \$.00 for distribution.